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Nos. 02-1591, 02-1599

Supreme Court, U.S.
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In The
Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

v.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petitions For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Nebraska Supreme Court rests on an independent and adequate state law ground, to wit, Respondent City of Lincoln had not properly delegated authority to its operating division, Respondent Lincoln Electric System, to apply for permission to offer telecommunications services as a contract carrier within its existing service area.

PARTIES TO THE PROCEEDINGS

Respondent City of Lincoln (02-1591) is a Nebraska home rule charter city. Respondent Lincoln Electric System (02-1599) is an operating division of the City of Lincoln. Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association (02-1591) are Nebraska nonprofit corporations. Petitioner Nebraska Public Service Commission (02-1599) is an agency of the State of Nebraska.

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OPINIONS BELOW

The decision of the Nebraska Supreme Court is captioned *In re Application of Lincoln Electric System* and is reported at 265 Neb. 70, 655 N.W.2d 363 (2003). In two unreported orders the Nebraska Supreme Court denied Petitioners' motions for rehearing and to stay issuance of the mandate. The decision of the Nebraska Public Service Commission in this proceeding is also unreported. These three unreported decisions are reproduced in the appendices of both petitions.

JURISDICTION

Petitioners timely invoked jurisdiction of this Court under 27 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land . . . .

47 U.S.C. § 253(a) (2000):

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Neb. Rev. Stat. § 86-128(1)(b) (Supp. 2002):

> The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to any agency or political subdivision of the state.

Neb. Rev. Stat. § 86-575(2) (Supp. 2002):

> No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

RESPONDENTS' STATEMENT OF THE CASE

This case arises against the backdrop of the Telecommunications Act of 1996, Pub. Law 104-104, 110 Stat. 56, which was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers. . . ." H.R. Rep. No. 104-204 at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 11. As this Court has observed,

the Telecommunications Act of 1996 "fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs [local exchange carriers] are subject to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). What the City of Lincoln has sought to do in these proceedings is precisely what Congress intended in the Telecommunications Act of 1996 – to expand the competitive telecommunications offerings available to consumers within its market area. To date, the City has been unsuccessful, not because of federal law, but because of an unduly restrictive interpretation of its municipal powers under Nebraska law.

The City of Lincoln's Home Rule Charter Provides the City with a Broad Grant of Power

Under Article XI, § 2 of the Nebraska Constitution, cities with a population over 5,000 may adopt a charter for their municipal governments. The City of Lincoln is one of two cities in Nebraska which has adopted a home rule charter.[1] As the Nebraska Supreme Court has explained:

> The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field.

[1] The other is Omaha.

Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 614-15 (1942). The only limit on a home rule charter is that the City remains subject to the constitution and laws of the State of Nebraska.

In 1992, the City of Lincoln amended its home rule charter to change it to a "limitation of power" model of charter from a "grant of power" model. The Lincoln City Charter now provides:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the Constitution of the State of Nebraska, except as prohibited by the State Constitution or restricted by this Charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The City shall also have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this Charter.

City of Lincoln Charter, Art. II, Sec. 1.

The "limitation of power" model the City of Lincoln adopted conformed to the distinction the Nebraska Supreme Court made in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927). In that decision, the court described the differences between the limitation and grant of powers models of charters:

> It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld.

Id. at 248, 207 N.W. at 174 (quotation omitted). With the 1992 charter amendments, the City of Lincoln obtained the right to exercise *all* municipal powers available to it under Nebraska law. It was under this expanded authority that the City of Lincoln, through its Lincoln Electric System ("LES"), sought to increase its service offerings to customers in its market area.

Proceedings Before the Nebraska Public Service Commission

In October 2000, LES filed an application requesting a permit from the Nebraska Public Service Commission ("NPSC"), asking NPSC to authorize LES to provide telecommunications services for hire. An operating division of the City of Lincoln, LES is a municipal utility that provides electric service to customers within a 190-square mile area in and around Lincoln. Its existing network of transmission lines had unused fiber optic capacity, and LES sought permission to put that capacity to productive use as a telecommunications contract carrier.

Petitioner Nebraska Telecommunications Association ("NTA") was one of the 30 intervenors in the LES proceeding. (*See* Petition in 02-1591 at A-25-26.) Petitioner NTA then moved for a declaration that LES did not have

express or implied authority under either state law or the Lincoln City Charter to provide for-hire telecommunications services.

NPSC agreed with the NTA on both grounds and dismissed LES' application to provide telecommunications services for hire. The agency held that no state statute authorized LES to provide telecommunications services for hire. NPSC also reached the same conclusion regarding the Lincoln City Charter, finding no express grant of power to LES "to engage in the for-hire telecommunications business." (*See* Petition in 02-1591 at A-34.) One member of NPSC concurred in the result, finding that while the Lincoln City Charter permitted the City to offer for-hire telecommunications services, the Lincoln City Council had not properly delegated that authority to LES. (*See* Petition in 02-1591 at A-48, A-51.)

Decision of the Nebraska Supreme Court

LES appealed the agency's decision to the Nebraska Supreme Court. While LES' appeal was pending, the Nebraska Legislature addressed the statutory vacuum NPSC said existed in state law. Bowing to intense lobbying from the private telecommunications industry, the legislature enacted 2001 Neb. Laws, L.B. 827. This act provided that NPSC "shall not issue . . . a permit . . . to an agency or political subdivision of the state," nor shall any "agency or political subdivision of the state . . . provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier."[2] Petitioner NTA,

[2] These provisions are currently codified at Neb. Rev. Stat. § 86-128(1)(b) and § 86-575(2) (Supp. 2002). For convenience, the provisions

(Continued on following page)

appellee below, moved to dismiss LES' appeal based on the prohibitions that L.B. 827 imposed. LES opposed NTA's motion on the ground L.B. 827 was preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253(a) (2000). Though LES duly notified the Nebraska Attorney General of its constitutional challenge to L.B. 827, the Attorney General neither entered an appearance nor filed a brief in the Nebraska Supreme Court. *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 74-75, 655 N.W.2d 363, 368 (2003).

The Nebraska Supreme Court affirmed NPSC's decision to dismiss LES' application. The state supreme court premised its affirmance on its interpretation of state municipal law. To reach that conclusion, however, the court first had to address LES' preemption challenge to the recently enacted statutory prohibition against municipal telecommunications services found in L.B. 827. Its preemption analysis was reasoned and thorough. The court discussed the import to this case of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which held that where Congress intends to change the balance between the federal government and the states, Congress must make its intent "'unmistakenly clear.'" 265 Neb. at 77, 655 N.W.2d at 370. The court then reviewed in detail the reasoning of the principal decisions that addressed the preemptive effect of 47 U.S.C. § 253(a). Having a "concurrent duty to enforce federal law," the court concluded that based on the rule of statutory construction set out in *Salinas v. United States*, 522 U.S. 52 (1997), "Congress' use of the phrase 'any entity' in § 253(a) is indicative of an

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at issue here will be referred to by their legislative bill number "L.B. 827."

expansive scope which includes a governmental entity, such as a municipally-owned utility, seeking to provide telecommunications services." *Id.* at 79, 80, 655 N.W.2d at 371, 372. Because L.B. 827 did not fall within the safe harbors provided by 47 U.S.C. §§ 253(b) or (c), the court held that federal law preempted L.B. 827. *Id.* at 80, 655 N.W.2d at 372.[3]

The court's preemption holding was only the first part of its disposition of LES' appeal. Although LES prevailed on the preemption issue, LES still had to establish its authority under state municipal law to offer telecommunications services on a for-hire basis. On this point the Nebraska Supreme Court ultimately agreed with NPSC.

The municipal law question centered first on what powers the Lincoln City Charter conferred on LES to offer telecommunications services for hire. Petitioners argued to the supreme court that a legislative grant of municipal power must be interpreted under the doctrine of strict construction known as Dillon's Rule.[4] While that rule may have once applied to the Lincoln City Charter, the court believed the 1992 revisions to the Lincoln City Charter took it outside the strict construction Dillon's Rule would impose. *Id.* at 83, 655 N.W.2d at 374. Instead, the question was whether the broad authorization of powers found in the Lincoln City Charter included the authority for the

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[3] There are three petitions for certiorari (02-1238, 02-1386 and 02-1405) pending for review of the ruling of the Eighth Circuit Court of Appeals in *Missouri Municipal League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002).

[4] The doctrine is named after legal scholar and jurist John F. Dillon. *See* 2A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 10.09 at n.6 (3d ed.)

City to provide telecommunications services for hire. Following its prior precedent in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927), in which the City of Lincoln was held authorized to sell gasoline and oil, the court concluded that providing telecommunications services for hire served a sufficiently public purpose to be within the City of Lincoln's municipal powers. 265 Neb. at 86-87, 655 N.W.2d at 375-76.

Nevertheless, while rejecting NPSC's interpretation of Nebraska municipal law governing the power of home rule charter cities, the Nebraska Supreme Court agreed with NPSC that the Lincoln City Council had failed legislatively to delegate its available authority to LES. Though LES had clear authorization to provide electrical service, the court saw nothing in the record to support a finding that provision of telecommunication services was "*necessary* to the efficient operation of the electric system." *Id.* at 88, 655 N.W.2d at 377 (emphasis in original). Thus, the Nebraska Supreme Court concluded, "the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services." Accordingly, the court affirmed the dismissal of LES' application. *Id.*, 655 N.W.2d at 377.

Following the ruling, Petitioner NTA moved for reconsideration and then to stay issuance of the court's mandate. NPSC, appearing for the first time through the Nebraska Attorney General, likewise moved to stay issuance of the mandate. Respondent objected to NPSC's request on the ground that, although NPSC was listed on the caption of the court's opinion as an appellee, NPSC was not certified as a party on LES' appeal and had merely functioned as the tribunal in the proceedings that LES

had appealed. *See* Appellant's Objection to Nebraska Public Service Commission Request to Stay Issuance of Mandate, dated February 22, 2003, at 1-2. Moreover, the Attorney General had not earlier seen fit to respond to LES' constitutional challenge to L.B. 827, despite receiving the required notice of LES' challenge.[5] The court denied without opinion NTA's motion for reconsideration, as well as the motion to stay issuance of the mandate that NTA and NPSC had filed. (*See* Petition in 02-1591 at A-57, Petition in 02-1599 at A-25, A-26.)

REASONS FOR DENYING THE WRIT

I. The Decision below Rests on an Adequate and Independent State Law Ground

The Nebraska Supreme Court reached three principal conclusions in its decision. First, the court held that 47 U.S.C. § 253(a) preempted L.B. 827. Second, the Lincoln City Charter authorized the City of Lincoln to provide telecommunications services for hire. But the Nebraska Supreme Court nevertheless affirmed NPSC because the court ruled that the Lincoln City Council had failed to

[5] Indeed, there is no provision in the state law governing appeals that authorizes NPSC to be a party in any appeal of its decision when, as here, it was acting as a neutral tribunal. In fact, Nebraska's Administrative Procedures Act, though not fully applicable, would suggest the contrary. Neb. Rev. Stat. § 84-917(2)(a) (Supp. 2002) ("if an agency's only role in a contested case is to act as a neutral fact finding body, the agency shall not be a party of record."); *cf. Karnes v. Wilkinson Mfg. Co.*, 220 Neb. 150, 152, 368 N.W.2d 788, 789 (1985) (Tax Commissioner was not a "person aggrieved" by decision of state board of equalization and hence lacked standing under 84-917 to appeal).

properly delegate authority to LES to use its excess fiber optic capacity to provide telecommunications services for hire.

When a state court decision rests on both federal and state law questions, this Court will defer reviewing the federal question if the state court's judgment rests on independent and adequate state law grounds. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). As stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

This principle is also premised on this Court's respect for the independence of state courts. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). A straightforward application of this principle leaves no doubt that the decision below affirming the dismissal of LES' application rests on an adequate and independent state law ground.

The Nebraska Supreme Court was forced to address the preemption question because the legislature enacted L.B. 827 while LES' appeal was pending. Having resolved

the preemption question in LES' favor, however, the court then had to address the remaining state law questions. While the court rejected NPSC's interpretation of the City's home rule charter, it nevertheless affirmed the agency's decision to dismiss LES' application because of the absence of express city council authorization to LES to provide telecommunications services.

Though only a comparatively short part of its opinion, the court's reasoning on city council authorization is critical. While the court first stated that "LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area," 265 Neb. at 88, 655 N.W.2d at 377, the court disagreed that LES was authorized to use its facilities to provide other services. Instead, the Nebraska Supreme Court reasoned: "However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city." *Id.*, 655 N.W.2d at 377. Thus, the court concluded:

> The record does not reflect that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services.

Id., 655 N.W.2d at 377 (emphasis in original).

The independence of the state court decision is beyond peradventure, as the Nebraska Supreme Court did not need to refer to federal law when analyzing the issue of

city council authorization to LES. Likewise, there is absolutely no implied reliance on federal law in the holding that LES lacked authorization from the Lincoln City Council to provide telecommunications services for hire. The court simply reasoned that the City's existing authorization to LES to provide electrical service was insufficient to authorize LES to provide for-hire telecommunications services.

There is also no dispute that the court's delegation ruling was adequate to support the judgment below. The court's affirmance of NPSC's dismissal of the LES application was final on that basis alone. Tellingly, Petitioners gloss over this aspect of the supreme court's decision, relegating it to a passing footnote reference. (*See* Petition in 02-1591 at 8 n.3; Petition in 02-1599 at 6 n.5.) Because the decision below is so plainly one resting on an independent and adequate state law ground, that reason alone compels denying the petitions.

II. The Nebraska Supreme Court Correctly Applied this Court's Preemption Precedents

To obtain review, Petitioners urge that 47 U.S.C. § 253(a) alters the constitutional balance between the states and the federal government if it is read to preempt state regulation of telecommunications activities by municipalities. Petitioners contend that courts must first apply the "plain statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), before concluding that section 253(a) does, in fact, preempt such state action. In enacting section 253(a), Petitioners claim that Congress failed to satisfy the *Gregory* decision, because Congress did not specifically note that municipalities fall within the broad

meaning of "any entity." Because section 253(a) expressly preempts conflicting state law – unless the safe harbors of sections 253(b) or (c) apply – the only dispute that Petitioners present under *Gregory* is whether "any entity" actually means all types of entities, or whether that provision must be read to exclude entities owned by cities or other political subdivisions of a state. By ignoring the fundamental precepts of *Gregory* and its progeny, Petitioners erroneously conclude that the Nebraska Supreme Court's decision was inconsistent with this Court's prior preemption decisions.

In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act of 1967 (ADEA) prohibited the State of Missouri from imposing mandatory retirement on state judges based on age. *Id.* at 455. The Court recognized that enforcing the ADEA in favor of Missouri's constitutional officers imposed federal regulation on matters traditionally left to the states, but it did not doubt that the federal government could upset the usual constitutional balance of federal and state powers. *Id.* at 460. Rather, the Court merely found that federal involvement in a matter of traditional state concern is "a power that we must assume Congress does not exercise lightly." *Id.* As a result, the Court directed that courts "be certain of Congress' intent before finding that federal law overrides this balance." *Id.* (quotation omitted).

The Court reasoned in *Gregory* that a "plain statement rule" was necessary because "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id.* at 461 (quoting *Will v. Michigan Dept. of State*

Police, 491 U.S. 58, 65 (1989)) (other quotation omitted). But *Gregory* did not establish a talismanic approach, as the Court itself characterized the rule as "nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* Applying this rule to the ADEA and appointed judges, the Court found that Congress' intent regarding enforcement of the ADEA in favor of the judges was "at least ambiguous," given that most other public officials were excluded from the ADEA's protection. *Id.* at 470. Consequently, the plain statement rule was not satisfied. *Id.* As the Court's analysis illustrates, the *Gregory* inquiry concerns only whether Congress' intent was clear.

More recently, the Court applied this rule to a federal statute worded similarly to section 253(a). In *Salinas v. United States*, 522 U.S. 52 (1997), the Court addressed whether a federal bribery statute, which by its terms applied to "any business transaction," actually applied only to bribes affecting federal funds. The Court rejected the defendant's attempt to narrow the obviously broad scope of the law, finding that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose a narrowing construction." *Id.* at 57 (citations omitted). The Court specifically noted that in applying the *Gregory* standard, a "statute can be unambiguous without addressing every interpretative theory offered by a party." *Id.* at 60. Thus, the Court held that the proper inquiry is simply whether it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Id.* (citation omitted).

Applying this standard to the federal statute before it, the Court in *Salinas* concluded that "[t]he text of [the bribery statute] is unambiguous on the point under construction here" and thus "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id.* As *Salinas* illustrates, this Court has found that the use of "any" as a modifier is sufficiently clear to satisfy the *Gregory* plain statement rule. *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

The decision of the Nebraska Supreme Court is perfectly consistent with these precedents. On its face, *Gregory* supports the decision of the Nebraska Supreme Court. No ambiguity exists in section 253(a) that remotely resembles the ADEA provision addressed in *Gregory*. Section 253(a) makes no exceptions and creates no confusion as to its reach: "*No State or local statute or regulation*, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (2000) (emphasis added). An objective reading of this provision leaves no question that Congress intended to preempt *all* state regulation of entry into the telecommunications service industry by *any* entity. A narrower reading, such as that suggested by Petitioners, is contrary to the expansive language Congress used and would "press statutory construction to the point of disingenuous evasion [of] a constitutional question." *Salinas*, 522 U.S. at 60 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)). The statute's plain text leaves no doubt that Congress intended to insert

the federal power into this traditional state concern and, thus, the Nebraska Supreme Court properly applied this Court's *Gregory* principle.

The *Salinas* decision confirms the Nebraska Supreme Court's proper adherence to this Court's precedent. As in *Salinas*, the Nebraska Supreme Court faced a federal statute in which Congress clearly sought the broadest reach possible by employing the modifier "any" before the word "entity." Petitioners attempt to obscure this clarity by arguing that Congress *could have* intended to exclude municipalities from the meaning of "any entity." But as illustrated in *Salinas*, the approach to statutory interpretation used in *Gregory* is not a license to create an ambiguity simply by raising *possible* varying interpretations of a federal statute.[6] *Salinas*, 522 U.S. at 60 ("[A statute] need only be plain to anyone reading the Act that the statute encompasses the conduct at issue.") (quotation omitted). Thus, in *Salinas* the Court found no ambiguity in Congress' command when it used the term "any" and, accordingly, concluded that the bribery statute did not offend the *Gregory* principle. It follows that the Nebraska Supreme Court properly found that the plain statement rule does not preclude Congress' clear intent to preempt state regulation in this area of traditional state governance.

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[6] Indeed, Petitioners' focus on creating an ambiguity in the particulars of section 253(a) is misplaced; the plain statement rule does not require congressional precision with respect to statutory details. *See Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that the Court historically applied the plain statement rule only to "whether Congress intended a particular statute to extend to the States *at all*") (emphasis added).

The Nebraska Supreme Court's decision is also consistent with decisions from the Eighth Circuit Court of Appeals and the Western District of West Virginia on this exact issue. In *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002), various Missouri municipalities and public utilities mounted the same challenge as Petitioners do here – namely, that it is unclear whether Congress intended to include municipalities within the meaning of "any entity" in section 253(a). *Id.* at 953. The Eighth Circuit rejected this argument, holding that "[t]here is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term." *Id.* The court further found that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54. The court supported its conclusion with firm reliance on this Court's precedent. *Id.* (quoting *Gonzalez*, 520 U.S. at 5).

Likewise, the court in *City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D.Va. 2001), rejected an attempt to contort the plain meaning of "any entity" in section 253(a). The court found "that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be 'entities' within the meaning of the Telecommunications Act." *Id.* at 747. And like the Eighth Circuit, the court concluded that "[s]uch an interpretation is confirmed by the use of the modifier 'any.'" *Id.* The court similarly relied on and applied this Court's precedents, holding "that the use of the modifier 'any' in a federal statute precludes a narrow interpretation of the law's application." *Id.* (citing *Salinas*, 522 U.S. at 57; *Gonzales*, 520 U.S. at 5). As a result, the court found that "it strains logic to interpret the term 'any entity' in § 253(a) to mean

'any entity except for municipalities and other political subdivisions of states.'" *Id.*

The contrary opinion in *City of Abilene v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), does not justify granting the petitions. This decision is an aberration, relying as it does on an ethereal, if not odd, notion of congressional *tone* of voice rather than this Court's clear precedents. *Id.* at 52-53. As noted in *City of Bristol*, notions of tone of voice have no role in statutory interpretation. 145 F. Supp. 2d at 749. Inflections of sincerity, concern, emphasis or even sarcasm simply are not part of the written record that comprises legislative history. The *City of Abilene* court also utterly failed to justify its decision on preemption with Congress' manifest pro-competitive interest in the Telecommunications Act of 1996. Moreover, the most recent decisions reviewing *City of Abilene* have uniformly rejected its reasoning, which suggests that further percolation in the lower courts will properly rectify any conflict in favor of this Court's precedents. *See, e.g.*, *Missouri Mun. League*, 299 F.3d at 954-55; *City of Bristol*, 145 F. Supp. 2d at 749; *In re Application of Lincoln Elec. Sys.*, 655 N.W.2d at 370-72.

Finally, the Court's decision in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), is inapposite. *Raygor* concerned whether 28 U.S.C. § 1367(d) tolled the statute of limitations for claims against non-consenting states that are subsequently dismissed on Eleventh Amendment grounds. *Id.* at 542. Section 1367(d) purported to apply to "any claim," but the Court expressed reservations over reading the statute with such an expansive scope in the absence of clearer congressional intent that it apply to states. *Id.* at 542-44. The Court ultimately found that Congress had not sufficiently expressed its clear intent to have section 1367 apply to the states for

purposes of abrogating their Eleventh Amendment immunity. *Id.* at 544-46.

Raygor is inapposite because there is no question that Congress intended that section 253 apply to the states – the statute in fact *limits* its reach to the states and local government. 47 U.S.C. § 253(a) (2000). Thus, the concerns in *Raygor* that Congress did not sufficiently express its intent to have the statute apply to the states cannot be present here. In short, no further review by this Court is warranted in this case. The Nebraska Supreme Court correctly followed *Gregory* and *Salinas* to enforce the balance between federal and state authority that Congress struck when enacting 47 U.S.C. § 253.

III. Petitioners' Asserted Conflict is Less than It Appears and Does Not Warrant Review of this Case in Any Respect

Petitioners assert that a clear conflict exists between this case and the decision of the District of Columbia Circuit in *City of Abilene*. It is true that the *Missouri Municipal League* and *City of Bristol* line up with this case in opposition to *City of Abilene* and two state cases, one from Iowa and one from Georgia. But this conflict is less than Petitioners urge, and if the lower courts are allowed to address this issue further, is likely to be of limited significance. The Iowa decision, *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), followed close on the *City of Abilene* decision and merely parroted that decision. *Id.* at 252. Significantly, the Iowa Supreme Court did not need to seriously analyze the import of 47 U.S.C. § 253(a), as it held the state statute preempted under another provision of the Telecommunications Act of 1996. *Id.* at 253-54. The Georgia case, *Municipal Elec. Auth. of*

Georgia v. Georgia Pub. Serv. Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999), similarly failed to undertake any meaningful analysis of the preemption question. *See id.* at 241, 525 S.E.2d at 403. Moreover, any administrative issues the FCC may encounter while this difference works out can be resolved by the FCC rejecting the *City of Abilene* decision. Indeed, because the FCC concedes that provisions like L.B. 827 conflict with the congressional purpose in the 1996 legislation, *see In re Missouri Mun. League*, 16 F.C.C.R. 1157, 1163 (2001), it is surprising to see that the FCC is petitioning this Court.[7] *See also In re Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritec Corporation*, 13 F.C.C.R. 19046, 1998 WL 658606 (F.C.C.) ¶ 10, ¶ 16 (1998) (term "entity" should be interpreted broadly to achieve pro-competitive intent of Congress in passing Telecommunications Act of 1996).

In any event, the decision below is far more limited than Petitioners claim. As it came out of the Nebraska Public Service Commission, this case turned simply on the question of whether the home rule charter under which the City of Lincoln operates conferred upon it sufficient power in its own right to seek a contract carrier permit without further state authorization. The Nebraska Supreme Court, having found that the Lincoln City Charter

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[7] Indeed, the FCC's position is that under § 253(a), a state law cannot prevent an independent corporate entity – even though wholly owned by a city or other political subdivision of a state – from offering telecommunications services for hire. 16 F.C.C.R. 1169, ¶ 20. Thus, the position the FCC takes on preemption under § 253(a) depends on the form of the entity a municipality chooses, a position that hardly reflects the federalism concerns expressed in *Gregory*.

was, in fact, a limitations of power charter, concluded that Dillon's Rule, a rule of strict construction, did not apply to it. 265 Neb. at 83, 655 N.W.2d at 374. The broad authorizing language contained in the City charter was, therefore, sufficient to support the application for contract carrier permit authority. Thus, the intervening adoption of L.B. 827 by the Nebraska Legislature was a clear and unequivocal attempt to prohibit an otherwise authorized entity from engaging in the field of telecommunications. It was this prohibitory language of L.B. 827 that was found to be preempted by federal law and thus unconstitutional.

Nor is there cause to hold this case pending review of *Missouri Municipal League*, should this Court grant the FCC's petition for certiorari in 02-1386. The Nebraska Supreme Court may have held L.B. 827 preempted, but the court affirmed NPSC, which had dismissed LES' application as lacking support under state municipal law. Even if this Court reverses the Eighth Circuit decision in *Missouri Municipal League*, the judgment below will be unaffected. If this Court were to reverse the Eighth Circuit, the Nebraska Supreme Court should be allowed to undo its preemption holding in the context of a real, live controversy. Thus, any decision on preemption by the Nebraska Supreme Court in *this* proceeding following a reversal of the Eighth Circuit would be purely advisory.

CONCLUSION

Because the decision below rests on an adequate and independent state ground, the Petitions in 02-1591 and 02-1599 should be denied. Even on the merits, the asserted conflict does not merit review, regardless of whether the issue is reviewed in *Missouri Municipal League*.

Respectfully submitted,

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